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No. 99-1503

APR 10 2000

CLERK

In The

Supreme Court of the United States

KRIS NELSON,

Petitioner,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit abused its discretion by refusing to issue the extraordinary remedy of a writ of mandamus ordering the District Court to reverse its discretionary denial of Petitioner's motion to amend her Complaint.

CORPORATE DISCLOSURE STATEMENT

Respondent UNUM Life Insurance Company of America is owned by UNUM Holding Company and UNUMProvident Corporation.

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STATEMENT OF THE CASE

This case comes before the Court from the denial by the United States Court of Appeals for the Ninth Circuit of a Petition for Writ of Mandamus in which Petitioner Kris Nelson ("Petitioner") sought reversal of an interlocutory order of the United States District Court for the Northern District of California denying Petitioner's motion to amend her Complaint.

Petitioner originally filed suit against Respondent UNUM Life Insurance Company of America ("UNUM") on May 7, 1996, in California state court. Petitioner's Complaint asserted, among other things, a claim that UNUM breached the covenant of good faith and fair dealing under California common law by terminating her disability benefits under an employer-provided group disability insurance policy (the "bad faith claim"). On November 26, 1996, UNUM removed the case to federal court and moved to dismiss all of Petitioner's claims on the grounds that they were preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* Petitioner thereafter conceded that ERISA preempted her bad faith claim. Memorandum Of Points And Authorities In Opposition To Motion To Dismiss dated February 22, 1997 at 2.

On April 11, 1997, the District Court, Judge William A. Ingram, dismissed Petitioner's bad faith claim on the grounds that it was preempted by ERISA. The District Court denied UNUM's motion with respect to three other state law tort claims, which the court found were not related to Petitioner's employee benefit plan and, therefore, not preempted by ERISA. The District Court also

granted Petitioner leave to amend her Complaint to assert claims under ERISA, which she did.

On April 20, 1999, this Court issued its decision in *UNUM Life Ins. Co. v. Ward*, 526 U.S. 358 (1999). On June 4, 1999, Petitioner moved to amend her Complaint to reassert a bad faith claim under California law alleging a breach by UNUM of the implied covenant of good faith and fair dealing in terminating her benefits under the plan. As grounds for this motion to amend, Petitioner argued that footnote 7 of the *Ward* decision signaled that ERISA no longer preempted state law bad faith claims if such claims were laws that regulated insurance, and that California's bad faith cause of action is a law that regulates insurance. Alternatively, Petitioner requested that the District Court certify the ERISA preemption issues to the Ninth Circuit for interlocutory review in the event the District Court chose to deny her motion to amend.

On September 9, 1999, the District Court denied Petitioner's motion to amend. After reviewing both this Court's landmark decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), and this Court's recent decision in *Ward*, the District Court held that:

> California's bad faith law is preempted by ERISA because it is clearly "related" to an employee benefit plan and it is not saved from preemption because it does not "regulate insurance" under either the common sense/*Pilot Life* definition (because it does not "home in on" the insurance industry) or the McCarran-Ferguson factors (because it does not "spread the risk," "focus on the insurance industry," nor is it "integral to the policy relationship").

Appendix ("App.") 5a.

The District Court further observed that Petitioner's reading of footnote 7 in *Ward* could not be reconciled with the language and substance of the footnote. At the same time, the District Court also denied Petitioner's request for certification of the ERISA preemption issues, finding that "the standard for certification of issues . . . has not been met in that there is not substantial ground for a difference of opinion on the question of whether [Petitioner] can allege a bad faith cause of action against her ERISA plan." App. 7a.

On October 21, 1999, Petitioner filed a Petition for Writ of Mandamus in the Ninth Circuit. Petitioner asked the Ninth Circuit to issue a peremptory writ directing the District Court to set aside and vacate its denial of her motion to amend her Complaint and to enter an order granting Petitioner leave to amend her Complaint to assert a bad faith claim. In her Petition, which she failed to include within the Appendix filed with this Court, Petitioner never articulated any reason why the Ninth Circuit needed to review the District Court's discretionary order on an interlocutory basis rather than after a final judgment has been entered, other than to assert that "the District Court's order is erroneous as a matter of law." *See* Petition of Writ of Mandamus In re Kris Nelson dated October 2, 1999 at 6-7. Rather, she simply restated her argument that footnote 7 in *Ward* changed the landscape of ERISA preemption in a manner that called for the Ninth Circuit to reconsider its decision in *Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988), which found bad faith claims under California law preempted.

On December 20, 1999, the Ninth Circuit denied the Petition for Writ of Mandamus. The Circuit Court neither considered Petitioner's interpretation of *Ward* nor analyzed whether ERISA preempted her cause of action for a breach of the implied covenant of good faith and fair dealing. Instead, the Circuit Court in a two-sentence order simply found that "Petitioner has not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus." App. 1a.

Petitioner now seeks from this Court a writ of certiorari in order that it may review two issues concerning the scope of ERISA preemption. For the following reasons, this Court should deny the Petition.

REASONS FOR DENYING THE WRIT

I. GIVEN THE PROCEDURAL POSTURE OF THE CASE, THE TRUE QUESTION PRESENTED IS WHETHER MANDAMUS WAS PROPERLY DENIED, AND THAT QUESTION DOES NOT WARRANT SUPREME COURT REVIEW.

In describing the "Questions Presented" by her Petition, Petitioner completely overlooks the procedural posture of this case and thereby fails to articulate the true issue presented. The Ninth Circuit in this case did not address the issues of ERISA preemption identified in the Petition. Rather, the Ninth Circuit panel simply refused to issue a writ of mandamus ordering the District Court to set aside and vacate its denial of Petitioner's motion to amend her Complaint in order to assert a claim against UNUM under California's bad faith law.

A writ of mandamus "may be granted or withheld in the sound discretion of the Court." *Ex parte Republic of Peru*, 318 U.S. 578, 584 (1943). The question presented at this stage of this litigation, therefore, does not concern the scope of ERISA preemption about which the Ninth Circuit has not yet opined in this case. Rather, the question presented is whether the Ninth Circuit abused its discretion by denying the request for a writ of mandamus. *Cf. Will v. United States*, 389 U.S. 90, 95 (1967) (finding it unnecessary to decide underlying substantive issue because writ of mandamus upon which appeal was based was not justified on record before Court).

This question does not warrant the Supreme Court's review. Petitioner has failed to offer any "special or important reasons" that call for the Court to review the Ninth Circuit's exercise of its discretion to deny the request for mandamus. Sup. Ct. R. 10. By summarily denying Nelson's petition, the Ninth Circuit has neither "entered a decision in conflict with the decision of another United States court of appeals" nor "so departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). Petitioner does not cite to a single case in which any court has even considered granting mandamus in circumstances such as those present here. Nor, finally, does the Ninth Circuit's denial of the petition for a writ of mandamus in this case constitute a decision of "an important question of federal law, that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

To the contrary, settled law pertaining to the standards for the issuance of a writ of mandamus made the

Ninth Circuit's decision to deny the petition both simple and routine. "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976); *Will v. United States*, 389 U.S. at 95; *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382-85 (1953); *Ex parte Fahey*, 332 U.S. 258 (1947). "The preemptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' " *Will v. United States*, 389 U.S. at 95 (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)) "[O]nly exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Id.* (quoting *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945)). A party seeking the issuance of a writ of mandamus must (1) "have no other adequate means to attain the relief [she] desires," *Roche*, 319 U.S. at 26, and (2) satisfy "the burden of showing that [her] right to issuance of the writ is 'clear and indisputable.' " *Bankers Life*, 346 U.S. at 384 (quoting *United States v. Duell*, 172 U.S. 576, 582 (1899)).

In her Petition for Writ of Mandamus to the Ninth Circuit, Petitioner failed to suggest any justification at all for why an interlocutory review of the ERISA preemption issues through a mandamus proceeding was necessary, rather than through an appeal in the ordinary course. *See* Petition of Writ of Mandamus In re Kris Nelson dated October 2, 1999 at 6-7. The District Court's denial of Petitioner's motion to amend her Complaint can be reviewed in the normal course after the District Court

enters a final judgment. "Consequently, it cannot be said that [Nelson] 'has no other adequate means to seek the relief [s]he desires.' " *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). Nor would any potential inconvenience caused by the normal process of waiting for a final judgment in lieu of a piecemeal appeal justify mandamus. *Bankers Life*, 346 U.S. at 383; *United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 202-03 (1945). Rather, that inconvenience is one which Congress contemplated when providing that only final judgments should be reviewable. *Roche*, 319 U.S. at 30.

Moreover, even if she otherwise had no appellate remedy, Nelson would still fail to qualify for a writ of mandamus because she cannot demonstrate that her right to a writ is clear and indisputable. Petitioner's motion to amend her Complaint was filed under Federal Rule of Civil Procedure 15(a). "It is settled that the grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). "Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.' " *Allied Chemical*, 449 U.S. at 36 (quoting *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665-66 (1978)). The law, thus, is clear that a district court's exercise of discretion "ought not be overridden by a writ of mandamus." *Will v. Calvert Fire Ins. Co.*, 437 U.S. at 665-66.

The use of a mandamus proceeding to review a discretionary decision of a district court is inappropriate even if that decision is wrong – which is not the case here. "Whereas a simple showing of error may suffice to obtain a reversal on direct appeal, to issue a writ of

mandamus under such circumstances 'would undermine the settled limitations upon the power of an appellate court to review interlocutory orders.' " *Id.* at 661 (quoting *Will v. United States*, 389 U.S. at 98 n.6). If simple error were enough, "then every interlocutory order which is wrong might be reviewed under the All Writs Act." *Bankers Life*, 346 U.S. at 382-83.

> The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction. In strictly circumscribing piecemeal appeal, Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power'.

Id. at 383. Clearly, the District Court's denial of the motion to amend was neither a clear abuse of discretion or a usurpation of judicial power meriting a preemptory writ of mandamus.

Petitioner's own argument for certiorari itself effectively concedes that her right to a writ of mandamus was not clear and indisputable. The crux of Petitioner's argument is that this Court in a footnote in its recent decision in *Ward* called into doubt previous holdings of this Court. Petition at 15-22. For the reasons discussed in Part II below, Petitioner's reading of footnote 7 of *Ward* is wrong. Nevertheless, even if she were correct that the law has become "unsettled," that fact itself would preclude a

finding that mandamus is necessary to rectify a clear and indisputable usurpation of power by the District Court. *Kerr*, 426 U.S. at 402; *Schlagenhauf v. Holder*, 379 U.S. 104, 112 (1964) ("The writ of mandamus is not to be used when 'the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction.' " (quoting *Parr v. United States*, 351 U.S. 513, 520 (1956))).

* * *

In sum, there is simply no good reason for this Court to review the Ninth Circuit's routine and straightforward exercise of its discretion in denying a writ of mandamus, especially where Petitioner herself offered the Ninth Circuit no proper reason why the extraordinary writ of mandamus was necessary.

II. EVEN IF ONE WERE TO OVERLOOK THE PROCEDURAL POSTURE OF THIS CASE, REVIEW BY THIS COURT WOULD STILL BE UNWARRANTED.

Even if one were to pretend that the Ninth Circuit in this case had ruled that ERISA preempts the California state law "bad faith" claim that Petitioner sought to prosecute, for three reasons there would still be no cause to review such a decision. First, as explained in Part II.A. of this Brief, immediately following, the premise upon which Petitioner builds her argument – that relevant ERISA preemption law is unsettled – is simply incorrect. Second, as explained in Part II.B., next following, California's bad faith law is not a law that regulates insurance within the meaning of ERISA section 514(b). Therefore, in

order fully to dispose of this case, this Court simply need not consider the issue whether ERISA preempts a state law cause of action that might be said to be a law which regulates insurance, but which nevertheless conflicts with the exclusivity provisions of section 502. Third, and finally, as explained in Part II.C., principles of *stare decisis* counsel against revisiting these issues that have previously been decided, and correctly so.

A. The Law Has Been Settled That ERISA's Exclusive Civil Enforcement Scheme Preempts State Law "Bad Faith" Claims By ERISA Plan Beneficiaries.

1. Precedent Prior To *Ward* Firmly Established That State Law Causes Of Action Were Preempted Because They Conflicted With The Exclusivity Of The Section 502 Remedies For ERISA Beneficiaries.

The Petition is premised upon a misunderstanding of this Court's precedent on the subject of ERISA preemption. ERISA implicates two different modes of preemption analysis. First, in accordance with the express language of ERISA section 514, 29 U.S.C. § 1144, ERISA expressly preempts all state civil laws that "relate to" employee benefit plans save those state laws that regulate insurance, banking, or securities. Under this broad, "express" preemption, state laws need not be in actual conflict with ERISA in order to be preempted. Rather, even state laws that are fully consistent with provisions of ERISA are preempted by section 514 unless they fall within the saving clause applicable to state insurance,

banking, or securities regulations. *See, e.g., Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829-30 (1988); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983).

Second, ERISA also preempts state laws to the extent that they "conflict[ ] with the provisions of ERISA or operate[ ] to frustrate its objects." *Boggs v. Boggs*, 520 U.S. 833, 841 (1997). This "conflict" or "frustration of purpose" preemption applies even to state laws, such as insurance regulatory laws, that would otherwise be saved from preemption under the express preemption provisions of ERISA section 514. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 99 (1993) ("State law governing insurance generally is not displaced, but 'where [that] law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress,' federal preemption occurs.")

The Court's decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), bore elements of both types of ERISA preemption analysis. The plaintiff in *Pilot Life* was a beneficiary under an employee benefit plan insured by Pilot Life. The issue before the Court was whether ERISA "preempts state common law tort and contract actions asserting improper processing of a claim for benefits under an insured employee benefit plan." 481 U.S. at 43. The plaintiff, Dedeaux, argued that ERISA did not preempt a cause of action under Mississippi's law of bad faith because that law was a state law that regulates insurance, and was thus saved from preemption by ERISA section 514(b). The Court rejected Dedeaux's argument, finding the Mississippi bad faith claim preempted by ERISA for two separately stated reasons.

First, the Court determined that Mississippi's bad faith law, while certainly "identified with the insurance industry," was not a law that regulates insurance within the meaning of section 514(b). The law was not specifically aimed at the insurance industry, the law did not affect the spreading of risk, and the law bore only an attenuated relationship to the insurer-insured relationship in that it affected only the consequences of a breach of the insurance contract rather than the terms of the contract itself. *Id.* at 50-51.

Second, and "most importantly," *id.* at 57, the Court determined that allowing ERISA beneficiaries to bring varying state causes of action for claims that were within the scope of ERISA's civil enforcement provisions "would pose an obstacle to the purposes and objectives of Congress." *Id.* at 52. Examining the language and structure of ERISA's civil enforcement provisions, and reviewing the legislative history of those provisions, the Court concluded "that ERISA's civil enforcement remedies were intended to be exclusive." *Id.* at 54. "The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." *Id.*

Congress decided, among other things, that ERISA beneficiaries who were improperly denied benefits should be entitled to recover not only their benefits, but also, in the court's discretion, their attorneys' fees, ERISA § 502(g), 29 U.S.C. § 1132(g), which fees they would not normally be entitled to recover under common law breach of contract actions. Countervailingly, Congress

decided to restrict recovery to the benefits and fees, eschewing punitive damages for example. 481 U.S. at 53-54. In this manner, Congress created what it deemed to be a properly balanced civil enforcement scheme that would protect beneficiaries while also encouraging the creation of benefit plans. *Id.* at 54. The Court resolved any arguable inconsistency between the language of the savings clause in section 514(b) and the broadly exclusive preemptive scope of the civil enforcement scheme under section 502 by concluding that "our understanding of the saving clause must be informed by the legislative intent concerning the civil enforcement provisions provided by ERISA section 502(a)." *Id.* at 52.

The Court's companion decision in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), underscored the significance and force of *Pilot Life*'s conclusion that the scope and contours of ERISA's preemptive effect goes beyond consideration of section 514 alone. Metropolitan, the insurer of an employee benefit plan, sought to remove to federal court on federal question grounds a claim by a beneficiary under Michigan state law challenging a termination of benefits under an insured employee benefit plan. The Court noted that, ordinarily, a preemption defense to a state lawsuit does not justify removal of the suit to federal court on federal question grounds. 481 U.S. at 63. The Court further acknowledged that it had previously held that ERISA preemption itself under section 514 "without more, does not convert a state claim into an action arising under federal law." *Id.* at 64 (citing *Franchise Tax Bd. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 25-27 (1983)). The Court nevertheless allowed removal on the basis of the "complete

preemption doctrine" because "as a suit by a beneficiary to recover benefits from a covered plan, it falls directly under section 502(c)(1)(B) of ERISA, which provides an exclusive federal cause of action for resolution of such disputes." *Id.* at 62-63. The preemptive effect of section 502 is so complete that an ERISA preemption defense provides a sufficient basis for removal of the cause of action to the federal forum notwithstanding the traditional limitation imposed by the "well pleaded complaint" rule. *Id.* at 64-67.

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990), further focused the Court's emphasis upon section 502 as a source of conflict preemption supplementary to ERISA's general preemption language in section 514. After finding a Texas common law cause of action preempted under section 514 because it related to ERISA plans, the Court emphasized the independently preemptive effect of section 502, stating:

> Even if there were no express preemption in this case, the Texas cause of action would be preempted because it conflicts directly with an ERISA cause of action.

Id. at 142.

Finally, the principle that even state insurance regulatory law is preempted by ERISA if it conflicts with congressional intent pertaining to specific aspects or provisions of ERISA was relied upon by the Court yet again in *John Hancock, supra*. There, the Court found a state law that admittedly regulated insurance, and was thus otherwise saved from express preemption under section 514, nevertheless preempted because it conflicted

with one of ERISA's purposes. *John Hancock*, 510 U.S. at 99 (When state insurance regulation "stands as an obstacle to the accomplishment of the full purpose and objectives of Congress, federal preemption occurs.").

Notwithstanding these holdings and pronouncements by this Court, Petitioner argues that the Circuit Courts have evidenced substantial confusion about whether ERISA preempts all state law remedial schemes that are within the scope of section 502. Yet, in the fourteen years that have passed since *Pilot Life* was decided, and out of what have undoubtedly been thousands of lawsuits by ERISA beneficiaries against insurers of ERISA plans, Petitioner can point to only one anomalous decision in which a circuit court of appeals allows an ERISA beneficiary to maintain a state law claim against an ERISA fiduciary challenging a benefit termination. *See Franklin H. Williams Trust v. Travelers Ins. Co.*, 50 F.3d 144 (2d Cir. 1995).[1]

Petitioner's attempt to portray the *Williams* decision as anything more than an anomaly inconsistent with established Supreme Court case law is undermined by her very argument that *Ward* footnote 7 has any significance. Both the Solicitor General and the Court in *Ward* noted that the Solicitor General's current position in 1999 represented a change from the Solicitor General's position in 1987. *Ward*, 526 U.S. at 376 n.7. Yet, it was the earlier position that was expressly adopted by the Court

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[1] *The Williams* court also appears not to have considered the decision in *John Hancock*.

in *Pilot Life*. *See Pilot Life*, 481 U.S. at 52. In short, Petitioner's very argument (that *Ward* signals a willingness to sustain state law claims by retracting or "modifying" the second half of the *Pilot Life* opinion to reflect the Solicitor General's newly changed position) itself concedes that current law based on the Solicitor General's prior view is to the contrary.

2. The Decision in *Ward* Did Not Cast Doubt on the Exclusivity of Section 502 Remedies.

Against the foregoing background, Petitioner seeks to advance the argument that last term's decision in *Ward* casts doubt on the exclusivity of the civil enforcement scheme of section 502. In support of this contention, Petitioner argues that footnote 7 in the *Ward* opinion constitutes a pronouncement by the Court that the relevant scope of ERISA preemption is an open and unsettled question. When Petitioner made this argument in the District Court, the District Court remarked that "reading footnote 7 and then reading plaintiff's analysis of it, the court wonders whether it is reading the same footnote plaintiff is." App. 6a n.2. The District Court's conclusion that footnote 7 does not even begin to support Petitioner's argument is clearly correct. Footnote 7 simply acknowledges that the current Solicitor General, as *amicus curiae*, sought to modify the position that his predecessor had advanced successfully in *Pilot Life*, suggesting in *Ward* that the insurance saving clause "saves state law conferring causes of action or effecting remedies that regulate insurance just as it does state mandated benefit laws." 526 U.S. at 376 n.7. Far from approving, or even

considering this argument by the Solicitor General, the Court simply noted that it "need not address the Solicitor General's current argument, for Ward has sued under § 502(a)(1)(B) for benefits due, and seeks only the application of a saved state insurance law as a relevant rule of decision in his § 502(a) action." *Id.*

Not a single Circuit Court has even considered the notion that *Ward* changes anything at all pertaining to the preemption of state law causes of action. It is true that four of eight district court judges presented with the issue have accepted the fiction that *Ward* somehow signals a reversal of *Pilot Life* and its progeny. *See Selby v. Principal Mut. Life Ins. Co.*, 2000 WL 178191 (S.D.N.Y. 2000); *Hall v. UNUM Life Ins. Co.*, No. CA-97-M-1828 (D. Co. Nov. 1, 1999); *Lewis v. Aetna Life Ins. Co.*, 78 F. Supp.2d 1202 (N.D. Okla. 1999); *Hoffman v. Empire Blue Cross & Blue Shield*, 1999 WL 782518 (S.D.N.Y. 1999); *but see Garrett v. Aetna Life Ins. & Annuity Co.*, No. CIV-99-1446-W (W.D. Okla. Mar. 8, 2000); *Clancy v. Employers Health Ins. Co.*, 82 F. Supp.2d 589 (E.D. La. 1999); *Campbell v. Guarantee Life Ins. Co.*, No. 99-279-S (E.D. Okla. Oct. 6, 1999); *Nelson v. UNUM Life Ins. Co.*, No. C-96-20974-WAI (N.D. Ca. Sept. 9, 1999) (App. 2a). But it would appear that the difference between those decisions that accept the notion of *Ward* changing the law and those that reject the notion is not due to a lack of clarity in this Court's precedent. Rather, the different holdings would seem to be due to a simple failure by the former group of courts to focus on either the second half of the *Pilot Life* decision or on this Court's statements in *Ingersoll* and *John Hancock* that even state insurance laws are preempted if they conflict with one of ERISA's provisions or purposes. In any event, a

split between district courts is hardly a reason to grant certiorari.

B. Because California's "Bad Faith" Law Is Not A Law That Regulates Insurance Within The Meaning Of ERISA Section 514(b), This Case Does Not Raise The Issue That Petitioner Claims *Ward* Cast Doubt On.

The issue raised by the Solicitor General's change of position as articulated in *Ward*, and which Petitioner now seeks to present for review in this case, is this: If a particular state law cause of action, unlike the one in *Pilot Life*, were deemed to be a state law that regulates insurance, would it be saved from preemption by the insurance saving clause of section 514(b) notwithstanding what this Court has said about the preemptive scope of the exclusive civil enforcement scheme of section 502? As a general proposition, it is difficult to conceive of any such state law cause of action that could be said to be a state law which regulates insurance within the meaning of this Court's previous interpretations of the saving clause. Generally speaking, causes of action challenging benefit determination processes and/or the state of mind of the fiduciary, like the one in *Pilot Life*, are not reasonably viewed as affecting the spreading of risk, and affect only the consequences of a breach of the insurance contract by way of remedy. They do not mandate or alter the terms of the contract itself. Rather, they impose penalties for failing to conform to the contract. *See Pilot Life*, 481 U.S. 50-51.

Be that as it may, even if one accepts the theoretical proposition that there could be a state law cause of action that could be said to be a law that regulates insurance within the meaning of section 514(b), it is clear that the California common law bad faith cause of action presented in this case is not such a law. This, indeed, was the precise holding of the District Court below. Following exactly the lead of this Court in *Ward*, the District Court assessed California bad faith law in accordance with both the "common sense" and the McCarran-Ferguson criteria employed in the first part of *Pilot Life*. Petitioner does not dispute that these criteria were the proper criteria to use in assessing California bad faith law. District Court Judge Ingram of the Northern District of California thereupon determined that California bad faith law is simply not a law that regulates insurance:

> This court concludes that under *Ward*, California's bad faith law is preempted by ERISA because it is clearly "related" to an employee benefit plan and it is not saved from preemption because it does not "regulate insurance" under either the common sense/*Pilot Life* definition (because it does not "home in on" the insurance industry) or the McCarran-Ferguson factors (because it does not "spread the risk," "focus on the insurance industry," nor is it "integral to the policy relationship").

App. 5a.

In so holding, the District Court relied upon, in part, the Ninth Circuit's earlier decision in *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489, 493-94 (9th Cir. 1989), in which the Ninth Circuit concluded that ERISA preempted

a common law claim under California law that an insurer violated the duty of good faith and fair dealing.

Petitioner suggests this Court might also review on certiorari this assessment of California law by a District Court sitting in California. Such an assessment, however, is not itself a suitable candidate for review by this Court. The legal rationale and test applied by the District Court to assess California state law tracked exactly this Court's rationale set forth in that part of the *Pilot Life* decision which no one, including Petitioner, challenges. The application of that indisputably correct standard to an analysis of California state law by a lower court familiar with the law of that state is an application that this Court does not in the normal course disturb. *See Ward*, 526 U.S. at 368 (citing *Runyon v. McGrary*, 427 U.S. 100, 181-82 (1976)). Moreover, such an application of the correct legal standard, even if the result were incorrect, is normally not a candidate for Supreme Court review. Sup. Ct. R. 10.

Nor, in any event, can it be said that the District Court erred in concluding that California's bad faith law is not a law that regulates insurance within the meaning of section 514(b). California's common law action for bad faith benefit denials no more spreads insurable risks than did the virtually identical Mississippi common law action for bad faith that was considered in *Pilot Life*. Spreading the risk is, as this Court has recognized, "an indispensable characteristic of insurance." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211-12 (1979). Similarly, the holding of the unanimous court in *Pilot Life* that the existence or nonexistence of a bad faith claim for compensatory and punitive damages is not "an integral part of the policy relationship" applies with equal and

identical force to a bad faith claim for compensatory and punitive damages in this case. On these two points – which constitute two of the three McCarron-Ferguson factors – there is no basis for even suggesting a distinction between Mississippi's bad faith law and that of California.

What Petitioner principally suggests, instead, is that California bad faith law differs from Mississippi bad faith law because, Petitioner says, California bad faith law "is grounded in policy concerns specific to the insurance industry." Petition at 25. In so arguing, Petitioner is undoubtedly correct to the extent she simply is saying that a claim for bad faith is identified with the insurance industry in California. But the same could be said – and was said – of Mississippi bad faith claims. *Pilot Life*, 481 U.S. at 50-51.

The California claim, like the Mississippi claim in *Pilot Life*, has its roots firmly in common law principles of general application. California has long recognized the existence of an "implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." *Comunale v. Traders & General Ins. Co.*, 328 P.2d 198, 200 (Cal. 1958). More generally, the California cases allowing tort recovery for bad faith breach of contract are but applications of the broader California common law doctrine that tort damages are recoverable for a breach of contract whenever the breach also constitutes an independent tort. *See Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 669 (Cal. 1995); *Egan v. Mutual of Omaha Life Ins.*, 620 P.2d 141, 146 (Cal. 1979); *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032,

1036-37 (Cal. 1973); *Crisci v. Security Ins. Co.*, 426 P.2d 173, 176-78 (Cal. 1967); *Comunale*, 328 P.2d 200-01; *Quezada v. Hart*, 136 Cal. Rptr. 815, 818 (Cal. Ct. App. 1977) (describing breach of covenant cases as intentional tort cases); *see also Lazar v. Superior Court*, 909 P.2d 981, 985, 989-90 (1996) (authorizing tort and contract recovery for fraudulent inducement of contract); *Chelini v. Nieri*, 196 P.2d 915 (1948) (mortician's breach of duty to properly embalm); *Buxbom v. Smith*, 145 P.2d 305, 311 (Cal. 1944) (tortious interference with business relations); *Pintor v. Ong*, 259 Cal. Rptr. 577 (Cal. Ct. App. 1989) (statutory failure to reconvey trust deed); *Hawkins v. Oakland Title Ins. & Guaranty Co.*, 331 P.2d 742, 746 (Cal. Ct. App. 1958) (negligent title search).

Thus, even if this Court were inclined, principles of *stare decisis* notwithstanding, to reverse its long-standing precedent concerning the independently preemptive effect of the exclusive civil enforcement scheme of section 502, such a decision would have no affect on the outcome of this litigation because application of California's bad faith law to a benefit determination under an ERISA plan would be flatly prohibited by a straightforward reading of section 514 alone: It relates to an ERISA plan within the meaning of section 514(a), and it is not a law which regulates insurance within the meaning of section 514(b). The issue supposedly raised by *Ward* which Petitioner seeks to present would only be presented in a case in which it were determined by the courts below that the applicable state law cause of action is a law that does regulate insurance within the meaning of the saving clause. And this is not that case.

C. Principles Of *Stare Decisis* Counsel Against Revisiting The Issues That Petitioner Seeks To Revisit.

Finally, even if the Ninth Circuit had reached the merits of this case after final judgment, and even if the Ninth Circuit had determined that California's bad faith law were a law that regulates insurance within the meaning of section 514(b), it would still not be appropriate to grant *certiorari* solely to consider the proposition posed by Petitioner.

That proposition has two components. First, Petitioner must contend that no provision of the subchapter of which ERISA section 514 is a part (and which includes ERISA sections 20-734, 29 U.S.C. §§ 1001-1191c) can preempt a state insurance regulatory law because such laws are expressly saved from preemption by section 514(b). Acceptance of this contention requires more than a "revisiting" of *Pilot Life*. It would eliminate the principled basis for the holding in *Taylor*. It would require as well a rejection of the Court's express and unambiguous explanation of section 502's preemptive scope in *Ingersoll*. And it would require the flat overruling of the precise holding in *John Hancock*, which found that a state insurance regulation which conflicted with ERISA sections 401 and 404, 29 U.S.C. §§ 1101 and 1104, was preempted. In short, accepting Petitioner's argument on the merits would require the rejection of everything that this Court has ever said about the relationship between express and conflict preemption under ERISA over the past fourteen years. Indeed, at base Petitioner's argument must be that section 514 is the be-all and end-all of ERISA preemption

analysis, and that there is no basis for conflict preemption independent of section 514.

Second, in order to prevail Petitioner would also need to establish that section 502 plays no role in interpreting the saving clause in section 514(b). In *Pilot Life*, this Court unanimously stated that its "understanding of the saving clause must be informed by the legislative intent concerning the civil enforcement provisions provided by ERISA section 502(a)." *Pilot Life*, 481 U.S. at 52. A fair reading of this statement is that by referring to "law[s] which regulate insurance," Congress did not have in mind private causes of action within the scope of section 502.

This reconciliation of the saving clause in section 514(b) with Congress's clearly-articulated and demonstrated intent to establish an exclusive civil enforcement scheme in section 502 comports with the practical realities of ERISA plan funding. At the time of ERISA's enactment, over 80% of the welfare benefit plans in the United States were insured and administered by insurance companies. *See Wadsworth v. Whaland*, 562 F.2d 70, 78 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978). *See also* 4 Health & Population Study Center, Battelle Human Affairs Research Centers, *Employee Welfare Benefit Plans and Plan Sponsors in the Private Nonfarm Sector in the United States*, 1978-79 at 44 (1980) (chronicles extensive discussion in Congressional record of carefully crafted remedial scheme for ERISA plans as well as Congress's intent that section 502 remedies would be exclusive). In the words of the Solicitor General, "[i]t would be quite peculiar for Congress to have failed to mention in those sections of the Committee reports dealing with Section

502 that alternative enforcement procedures in the form of state common law causes of action existed for those many employees participating in insured plans if in fact Congress did not intend the remedies in Section 502 to be exclusive." Brief for the United States as *Amicus Curiae* at 19, *Pilot Life*.

Nor can it be said that the unanimous Court in *Pilot Life* was unaware of the issues and arguments being raised by Petitioner or suggested by the current Solicitor General in *Ward*. The Court had previously recognized that section 514 was "perhaps . . . not a model of legislative drafting." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). In *Pilot Life* itself, the Solicitor General noted that "[b]ecause of the deficiencies in the draftsmanship of these provisions and the absence of substantial illumination from the legislative history, we readily acknowledge that [analysis of the relationship between the preemption and saving clauses] is necessarily uncertain." Brief for the United States as *Amicus Curiae* at 12. Pointing out the anomalous results of alternative interpretations of the meaning of the saving clause, the Solicitor General concluded that the best resolution of those uncertainties would be to hold "that Congress intended the procedures it established in section 502 to be the exclusive procedures for enforcing claims for benefits." *Id.* at 16 n.13.

Accepting that position, and later reaffirming and confirming the basic notion that conflict preemption existed under ERISA supplementary to the express provisions of section 514, this Court established a firm and uniform foundation upon which Congress's hoped-for expansion of employee benefits has been realized. For

over a decade, plans have been designed, funded, and priced on the assumption that suits challenging benefit determinations, wherever and however brought, would be subject to complete federal preemption, *Taylor*, 481 U.S. at 64-67, and would proceed in accordance with a uniform and exclusive civil enforcement scheme pursuant to which any beneficiary improperly denied benefits would recover both full benefits and, often, attorneys' fees, but not lottery-style punitive damages. Under this regime, insurers of plans are motivated to treat beneficiaries well in order not to displease the employers who select the carriers and pay the premiums, *Doyle v. Paul Revere Life Ins. Co.*, 144 F.3d 181, 183-84 (1st Cir. 1998) ("[A]n employer would not want to keep an overly tight-fitted insurer."), while at the same time they are able to keep premiums lower than they would in a non-uniform regime of varying state bad faith claims.

Against this background, to adopt Petitioner's argument on the merits, and find California's bad faith law not preempted, the Court would unsettle fourteen years worth of well-founded expectations by broadly rewriting fourteen years worth of its unanimous decisions. The Court should reject Petitioner's invitation to proceed in this manner, both because the result being advocated is wrong, and because *stare decisis* "promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). And this is especially so in cases such as this one that involve statutory interpretation. *See Patterson v. MacLean Credit Union*, 491 U.S. 164, 172-73 (1989) (*stare decisis* has "special force" in statutory interpretation); *see also Burlington Indus., Inc. v. Ellerth*, 524

U.S. 742, 764 (1998) (*quoting Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) (the Court "must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation.")).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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